

**QUEBEC PROCEDURAL LAW AS A
MICROCOSM OF MIXITY:
IMPLICATIONS FOR LEGAL PEDAGOGY,
JUDICIAL DECISION-MAKING, AND LAW
REFORM**

*Rosalie Jukier**

INTRODUCTION.....	691
I. THE SOURCES OF QUEBEC’S MIXITY	692
II. THE MIXED NATURE OF PROCEDURAL LAW IN QUEBEC.....	694
III. IMPLICATIONS OF QUEBEC’S PROCEDURAL MIXITY	699
A. THE IMPACT ON THE TEACHER: LEGAL PEDAGOGY IN A MIXED PROCEDURAL SYSTEM	699
B. THE IMPACT ON THE JUDGE: JUDICIAL DECISION- MAKING IN A MIXED PROCEDURAL SYSTEM.....	712
C. THE IMPACT ON THE LEGISLATOR: LAW REFORM AND THE MIXED PROCEDURAL SYSTEM	718
CONCLUSION	723

INTRODUCTION

Mixed jurisdictions have been called “the third legal family” by Louisiana scholar Vernon V. Palmer.¹ Although Palmer admits there is “no single paradigm” to mixity, mixed

* Professor and member of the Paul-André Crépeau Centre for Private and Comparative Law, Faculty of Law, McGill University, Montreal, Quebec, Canada. The author wishes to thank McGill law students Rachel Zuroff, Talya Kornitzer, and Avrah Levitan-Cooper for their invaluable research assistance generously funded by McGill’s Faculty of Law and the Foundation for Legal Research. The substance of this Article was first presented at the Fourth International Congress of the World Society of Mixed Jurisdiction Jurists on “The Scholar, Teacher, Judge, and Jurist in a Mixed Jurisdiction,” at the Faculty of Law, McGill University, June 25, 2015.

1. See, e.g., Vernon Valentine Palmer, *Quebec and Her Sisters in the Third Legal Family*, 54 MCGILL L.J. 321 (2009).

jurisdictions are generally legal systems characterized by some degree of bijurality or legal hybridity—systems in which there is a mix of laws and judicial attributes that derive from multiple tradition-based sources.² Although these sources are found primarily in the civil and common law traditions, they may derive from aboriginal, customary, and religious traditions as well. Because of the multiple historical influences on their legal formation and their bijural existence, mixed legal systems are also often jurisdictions with a history of legal transplantation and cross-fertilization of legal culture.

As many comparative jurists have maintained, mixed jurisdictions provide fascinating legal laboratories of study.³ This Article will focus on Quebec as one such mixed jurisdiction, and will examine Quebec procedural law as a microcosm of its mixity by providing insights into the impact of this mixity on legal pedagogy, judicial decision-making, and law reform.

I. THE SOURCES OF QUEBEC'S MIXITY

Quebec's characterization as a mixed legal system is not particularly controversial.⁴ Briefly, this Canadian province may be thought of as a mixed jurisdiction for three reasons.

The first, and the one that has received the most focus, is its

2. Palmer, *supra* note 1, at 324; *see id.* at 343–44 (listing six common characteristics of mixed legal systems).

3. *See* Vernon Valentine Palmer, *Conclusions, in* MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 611, 612 (Vernon Valentine Palmer ed., 2d ed. 2012) (“Though frequently described as laboratories of comparative law, [mixed jurisdictions] are in fact places that have a functional need for massive amounts of fresh air which only comparative research can supply.”); *see also* Hein Kötz, *The Value of Mixed Legal Systems*, 78 TUL. L. REV. 435, 435 (2003) (“In the author’s view the experience of the mixed legal systems may make a significant contribution to the great project of developing a European common law, and perhaps even of a European Civil Code.”).

4. *See, e.g.*, John E.C. Brierley, *Quebec (Report 1), in* MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 329, 329 (Vernon Valentine Palmer ed., 2001) (“The birth of Quebec’s Mixed system occurred with the transfer of sovereignty from France to England.”); H. Patrick Glenn, *Quebec: Mixité and Monism, in* STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING 1, 1 (Esin Örucü, Elspeth Attwooll & Sean Coyle eds., 1996) (“The concept of a mixed legal system appears to have been a creation of 19th and 20th century doctrine, which was largely transfixed by the idea of law as a pure and national product, capable of construction in the form of autonomous systems.”); William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 678 (2000) (“Mixed jurisdictions are really political units . . . which have mixed legal systems. Common law/civil law mixed jurisdictions include Louisiana, Quebec, St. Lucia, Puerto Rico, South Africa . . .”).

bijurality. As a result of Quebec's history and its origins as a French colony until the British conquest in 1759, both major western legal traditions, the civil law and the common law, find their place within the province's legal jurisdiction. More particularly, in 1774, the British Parliament enacted the Quebec Act,⁵ a seminal piece of legislation that, despite British rule in the territory, enshrined the right of Quebec to continue to apply French civil law, which was ultimately codified in the Civil Code of Lower Canada of 1866, and later in the Civil Code of Quebec of 1991.

The Canadian Constitution (the British North America Act, 1867) has also had an important impact on the legal landscape in Quebec. It created a federal system of government, dividing legislative powers between the central federal government and the provinces. Laws governing subject matter falling within federal jurisdiction (such as criminal law, bankruptcy, and banking) are dealt with in a uniform manner across the country, in accordance with the common law tradition. However, in matters that fall within the purview of the provinces (such as private law areas of contract, tort (civil responsibility), property, or successions), each province applies its own legal tradition. As such, these are generally dealt with according to civilian legal principles in Quebec and according to the common law in the rest of Canada. Quebec is thus said to be bijural in the sense that in its private law, Quebec follows the French civilian tradition, whereas in its public (or more accurately federal) law, it follows the law of the rest of Canada, which is of the English common law tradition.

The second reason Quebec may be considered a mixed legal system has to do with the character of its judicial institutions and the nature of its procedural law. The Superior Court of Quebec, a first-level entry point to the civil-justice system, is identical to all other superior courts across Canada, the judges of which are named and supervised by the federal government pursuant to § 96 of the Canadian Constitution.⁶ Most importantly, these

5. The Quebec Act 1774, 14 Geo. 3 c. 83, § VII (Eng.) (“[A]ll Causes that shall hereafter be instituted in any of the Courts of Justice, to be appointed within and for the said Province by his Majesty, his Heirs and Successors shall, with respect to such Property and Rights, be determined agreeably to the said Laws and Customs of Canada . . .”).

6. *Ontario v. Criminal Lawyers' Ass'n of Ontario*, [2013] 3 S.C.R. 3, 16, para. 18 (Can.) (“The essential nature and powers of the superior courts are constitutionally protected by s. 96 of the *Constitution Act, 1867*. Accordingly, the core or inherent

courts are modeled on the British administration of justice and its court system and, accordingly, are courts of inherent jurisdiction.⁷

Furthermore, the procedural system applied in Quebec courts has evolved to resemble quite closely the English adversarial system, rather than the continental inquisitorial or investigative system. As will be more amply explained below, while Quebec procedural law is presented in a civilian format, namely a code, over time it has come to follow the common law adversarial process of civil justice in its substance.

The third aspect of Quebec's mixity lies in the judiciary's role itself. Following the British tradition of judicial appointment, judges in Quebec, as in the rest of Canada, are named from the practicing Bar rather than educated in the classroom as in the continental system. Their judgment-writing style, which includes personal judgments, dissents, and lengthy discussions of issues and holdings, is more reminiscent of the common law style of decision writing than the terse, anonymous style of the continental-civilian system. Consequently, judgments in Quebec read very much like judgments from common law Canada, distinguished only by the fact that today, they are drafted primarily in French.

For these reasons, Quebec is a mixed legal system, in its substantive law, its procedural rules, and its institutions of justice.

II. THE MIXED NATURE OF PROCEDURAL LAW IN QUEBEC

As this tripartite conception of mixity reveals, a large component of Quebec's mixed nature can be attributed to its

jurisdiction which is integral to their operations . . . cannot be removed from the superior courts by either level of government, without amending the Constitution.") (internal quotations & citations omitted). Note that there are also provincial courts in each province (for example, the Cour du Québec). These are also first instance courts, but they are statutory courts with circumscribed jurisdiction.

7. R. v. Caron, [2011] 1 S.C.R. 78, para. 24 (Can.) (quoting I.H. Jacob, *The Inherent Jurisdiction of the Court*, 23 CURRENT LEG. PROBS. 23, 27, 51 (1970)) ("The inherent jurisdiction of the provincial superior courts, is broadly defined as 'a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so.' These powers are derived 'not from any statute or rule of law, but from the very nature of the court as a superior court of law.');" *Ontario*, [2013] 3 S.C.R. at para. 17 ("Canada's provincial superior courts are the descendants of the Royal Courts of Justice and inherited the powers and jurisdiction exercised by superior, district or county courts at the time of Confederation . . .").

adjectival law and its system of civil justice. Moreover, a closer examination reveals an interesting mixity even *within* its procedural law.

Quebec, originally a French colony, inherited continental-civilian procedure as reflected in the 1667 French *Ordonnance sur la procédure civile*.⁸ This *Ordonnance* reflected a traditional civilian conception of civil justice where procedure was centered in the hands of the judge who had powers of investigation. It was exemplified by the *enquête*, a process where the judge interviewed witnesses and reduced their testimony to writing. However, notwithstanding the Quebec Act of 1774,⁹ which allowed Quebec to maintain its civilian legal tradition in private-law matters even after it became a British colony in 1763, Quebec procedural law slowly began to inherit, in style and substance, the English adversarial system of procedure. This evolution resulted both from ordinances promulgated in the late eighteenth-century, which introduced many aspects of common law procedure and evidence,¹⁰ and from the adoption of successive codes of civil procedure that codified many procedural rules and principles borrowed from the common law.¹¹ Moreover, the institutions of civil justice, i.e., the courts, were structured in accordance with the English court system so the judicial hardware in which procedural rules operated in the province was based on the common law tradition.

Due to the infiltration of common law procedural elements that, over time, were transplanted into Quebec law, its procedural system gradually developed from one that was judge-centered, in

8. The Régime Français of Quebec is marked by the years 1534–1759. See *L'Ordonnance de Louis XIV, Roi de France et de Navarre, du mois d'Avril 1667*, in 1 ÉDITS, ORDONNANCES ROYAUX, RÉCLARATIONS ET ARRÊTS DU CONSEIL D'ÉTAT DU ROI, CONCERNANT LE CANADA, MIS PAR ORDRE CHRONOLOGIQUE, ET PUBLIÉS PAR ORDRE DE SON EXCELLENCE SIR ROBERT SHORE MILNES, BARONET, EN CONSÉQUENCE DE DEUX DIFFÉRENTES ADRESSES DE LA CHAMBRE D'ASSEMBLÉE, EN DATE DES 5E ET 7E MARS 1801 (1801).

9. The Quebec Act 1774, 14 Geo. 3 c. 83, § VII (Eng.).

10. These include, for example, the Ordinance of 1777 (instituting the application of English rules of evidence in commercial matters), the Ordinance of 1785 (instituting the jury in civil matters), and the Ordinance of 1787 (enabling the courts to write their own rules of practice). See generally JEAN-MAURICE BRISSON, *LA FORMATION D'UN DROIT MIXTE: L'ÉVOLUTION DE LA PROCÈDURE CIVILE DE 1774 À 1867* (1986).

11. Quebec has codified civil procedure four times in its history, in 1866, 1897, 1965 and 2014 (and there have also been several instances of substantial revision to existing Codes of Civil Procedure, such as the reforms to the 1965 Code that took place in 2002 and 2009).

the continental style, to one that became party-driven, in accordance with the adversarial system of justice. As early as 1897, at the time of the second codification of civil procedure, Quebec abolished the French *enquête* system and replaced it with the English system of open courts and the examination and cross-examination of witnesses, thereby transferring power and control over the litigation process from the judge to the parties.¹² By the third codification, which occurred in 1965, the Code of Civil Procedure explicitly proclaimed the parties to be the masters of their case.¹³

The disappearance of the continental process of the *enquête* had the effect of changing the nature of advocacy from written to oral. Oral examination and cross-examination of parties and witnesses in open court replaced the written nature of the dossier system characteristic of French procedure. This evolved into the creation of a pre-trial period, in which lawyers accumulated evidence and developed their case, distinct from the trial period where oral examination and argumentation, often before a jury, took place. This distinct pre-trial period is directly reminiscent of the English adversarial system and foreign to the French investigative one.¹⁴

12. Code of Civil Procedure of Quebec, S.Q. 1897, c 48, arts 16, 328–29 (Can.) (“The sittings of a court or of a judge are public The opposite party may establish by a preliminary examination of any witness produced, or in any other manner, whatever grounds he may have for objecting to such witness.”).

13. Code of Civil Procedure of Quebec, S.Q. 1965, c C-25, art 4.1 (Can.) (“Subject to the rules of procedure and the time limits prescribed by this Code, *the parties to a proceeding have control of their case* and must refrain from acting with the intent of causing prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith.”) (emphasis added). The 1965 Code was adopted in 2002. See An Act to Reform the Code of Civil Procedure, S.Q. 2002, c 7, s 1 (Can.). This principle can also be found in Quebec jurisprudence. See, e.g., *Imperial Oil v. Jacques*, [2014] 3 S.C.R. 285, para. 25 (Can.) (“[I]n an accusatory and adversarial system, the delicate task of bringing the truth to light falls first and foremost to the parties In this context in which the objective of seeking the truth remains the priority, the Quebec legislature has established general rules of evidence to govern and facilitate this process, *which remains under the control of the parties.*”) (emphasis added).

14. See Edward F. Sherman, *Transnational Perspectives Regarding the Federal Rules of Civil Procedure*, 56 J. LEGAL EDUC. 510, 513 (2006) (“An American trial is a single event in which witnesses and evidence are presented seriatim in a continuous proceeding The traditional continental civil law trial, on the other hand, is segmented with an ‘investigating magistrate’ taking ‘proof’ from witnesses over an extended period of time. When the dossier is complete, the evidence is presented to the judge (or in some countries to a panel of three judges) for decision.”); Stephen Goldstein, *The Odd Couple: Common Law Procedure and Civilian Substantive Law*, 78 TUL. L. REV. 291, 297 (2003) (“The second systemic difference between civil law

In addition to embracing the overall philosophy of the English adversarial system, Quebec borrowed several key procedural elements and processes from the common law. For example, discovery, a process unknown to the civilian procedural system, was adopted in Quebec in 1888 and later codified in the 1897 Code of Civil Procedure.¹⁵ Discovery is, of course, at the heart of a party-driven process. It is a procedure that was developed as a method of helping counsel in their active role of gathering and analyzing evidence during the pre-trial period, and is seen by many as an integral part of the adversarial system of justice.¹⁶ In addition to discovery, we find many other procedures and remedies that were transplanted into Quebec's adjectival law that are foreign to traditional civilian systems. Examples include the injunction,¹⁷ contempt of court,¹⁸ trial by jury in civil matters

and common law civil procedure concerns the method of providing information to the decider at the first instance."); Hein Kötz, *The Role of the Judge in the Court-Room: The Common Law and Civil Law Compared*, 1987 J. S. AFR. L. 35, 40–41 ("[U]nder common law systems, because of the jury, you have to have a concentrated trial in the sense that after the trial has started it will proceed without interruption perhaps for one day or a week or, if need be, for even a longer period until judgment can be handed down Clearly, under this system counsel must have pre-trial access to witnesses Civil procedure in Germany and other continental countries is in sharp contrast. There is no live tradition of the jury in civil cases, and even the use we make of lay judges in criminal trials differs very much from the Anglo-American pattern.").

15. Discovery was introduced as an amendment to the 1866 Code by way of art. 5879 of the Revised Statutes of Quebec of 1888, which enshrined it under art. 251(a). Discovery was then codified in the 1897 Code of Civil Procedure. See Code of Civil Procedure of Quebec, S.Q. 1897, c 48, arts 286, 288–89 (Can.) ("At any time before trial, but after defence filed, any party may summon any of the following persons to answer as a witness . . .").

16. Geoffrey C. Hazard, Jr. et al., *Introduction to the Principles and Rules of Transnational Civil Procedure*, 33 N.Y.U. J. INT'L. L. & POL. 769, 776–77 (2001) ("[W]ide-ranging pre-trial discovery is an integral part of contemporary American civil litigation, particularly in cases involving substantial stakes."); Kötz, *supra* note 14.

17. The injunction, in limited form, was introduced in 1878 in the Act to provide for the issue of the Writ of Injunction in certain cases, and to regulate the procedure in relation thereto, S.Q. 1878, (41 Vict.), c. 4 (Can.), and formally inserted in the 1866 Code by amendment in the Revised Statutes of Quebec, 1888, s. 5991 (Can.). The 1897 Code of Civil Procedure dedicated an entire chapter to developing a new system of injunction, creating the three types of injunctive relief with which we are familiar today: provisional, interlocutory and permanent. Code of Civil Procedure of Quebec, S.Q. 1897, c 48, arts 1030 *et seq.* (Can.).

18. Code of Civil Procedure of Quebec, S.Q. 1965, c C-25, art 49 (Can.) ("The courts or judges may condemn any person who is guilty of contempt of court."); see *Droit de la famille*, [1996] 2 S.C.R. 108, paras. 6–7 (Can.); *Vidéotron Ltée v. Indus. Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1056, paras. 12–25 (Can.).

(although now abolished in Quebec),¹⁹ judicial recusal,²⁰ and, most recently, the class action.²¹ As a result of this historical evolution and numerous instances of legal transplantation, by the mid to late twentieth century, Quebec's system of civil justice came to resemble quite closely that of a common law adversarial system.

The twenty-first century, however, has ushered in a new era, characterized by widespread civil-justice reform. The desire to create a new culture of civil justice began in the 1990s in England with the advent of the *Lord Woolf Report*, a report that advocated more judicial control over the litigation process in order to curb the high cost, long delays, and undue complexity that now characterizes many contemporary civil-justice systems.²² Canadian jurisdictions, including Quebec, have followed in Lord Woolf's footsteps, legislating many procedural reforms that encourage out-of-court settlement, ensure proportionality in procedures, and institute judicial case management to exercise more control over the parties and their lawyers. These new values of civil justice are enshrined in the 2014 enactment of Quebec's new Code of Civil Procedure, which came into force in

19. In Quebec, trial by jury in civil matters was introduced in the eighteenth century. See An Ordinance to regulate the proceedings in the courts of civil judicature, and to establish trials by juries in actions of a commercial nature and personal wrongs to be compensated in damages 1875, reprinted in ORDINANCES MADE AND PASSED BY THE GOVERNOR AND LEGISLATIVE COUNCIL OF THE PROVINCE OF QUEBEC 25 (1786). However, trial by jury was abolished in 1976. See An amendment to the Code of Civil Procedure, S.Q. 1976, c. 9 (Can.).

20. A civilian approach to judicial recusal was adopted in Quebec under the Ordonnance de 1667, which enumerated a list of objective categories for judicial recusal. However, in 1993, the Quebec Court of Appeal held that the common law standard of reasonable apprehension of bias would also apply as a category for recusal. *S.(P.) v. C.(A.J.)*, [1993] R.J.Q. 625, para. 11 (Can.) ("Moreover, it is apparent that in civilized jurisdictions other than the Province of Quebec apprehension of bias is a ground for recusation like any other, urged in the same way as any other."). This was subsequently codified in the 1965 Code of Civil Procedure. See An Act to reform the Code of Civil Procedure, S.Q. 2002, c. 7, s. 47; Code of Civil Procedure of Quebec, S.Q. 1965, c C-25, art 234(10) (Can.). See generally Luc Huppé, *La Transformation du Modèle Québécois de Récusation des Juges*, 46 R.J.T. 209 (2012) (discussing recusal in Quebec).

21. The class action was introduced in 1978. See An Act Respecting the Class Action, S.Q. 1978 c. 8, s. 3 (Can.). Quebec was the first jurisdiction in Canada to adopt this U.S. common law procedural device. The jurisdiction that next adopted the class action was Ontario in 1992. See Class proceedings Act, S.O. 1992 c. 6 (Can.).

22. THE RIGHT HONOURABLE THE LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1996) [hereinafter WOOLF, FINAL REPORT], <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/sec2a.htm#c2>.

January of 2016.²³

The particular reforms in Quebec's new procedural law will be discussed in more detail in the section of this Article dealing with the impact of mixity on law reform. However, on a general level, one cannot help but be struck by how many of these reforms, most notably those endorsing a more judge-centered approach to the pre-trial process, resemble attributes of continental procedural systems belonging to the civilian tradition.

The result today is that Quebec's procedural law has mixed origins and reflects an interesting blend of multiple legal traditions. Justice Louis LeBel, former justice of the Supreme Court of Canada, maintains that, "[T]hese mixed origins are . . . at the root of the semantic, if not conceptual problems that continue to affect this field of law."²⁴ Spun more positively, the complex and evolving mixity of Quebec procedure makes its adjectival law a particularly interesting microcosm of mixity to study. This Article demonstrates that Quebec's unique mixed character has had significant repercussions on the pedagogy of civil procedure, the judicial decision-making in procedural cases, and the law reform that is ongoing in this area of the law.

III. IMPLICATIONS OF QUEBEC'S PROCEDURAL MIXITY

A. THE IMPACT ON THE TEACHER: LEGAL PEDAGOGY IN A MIXED PROCEDURAL SYSTEM

There has been a significant evolution, if not revolution, in the teaching of civil procedure in North America over the last several decades. In particular, three interrelated developments have changed the entire mentality surrounding this law-school discipline. First, it has moved from being a course taught

23. An Act to Establish the New Code of Civil Procedure, S.Q. 2014, c 1 (Can.) ("This Code is designed to provide, in the public interest, means to prevent and resolve disputes and avoid litigation through *appropriate, efficient and fair-minded processes that encourage the persons involved to play an active role*. It is also designed to ensure the *accessibility, quality and promptness of civil justice, the fair, simple, proportionate and economical application of procedural rules*, the exercise of the parties' rights in a spirit of co-operation and balance, and respect for those involved in the administration of justice.") (emphasis added); see Code of Civil Procedure of Quebec, S.Q. 2016, c C-25.01, arts 1(3), 9(2), 18, <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-25.01> (providing more specific examples of codified values of civil justice).

24. *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc.*, [2004] 1 S.C.R. 456, para. 23 (Can.).

primarily by legal practitioners, from a practical and rule-oriented perspective, to one that is taught increasingly by full-time professors.²⁵ No longer seen as part of the apprenticeship or vocational component of a law student's legal training, civil procedure has gradually made its way into the core curriculum.²⁶ Having been placed in the hands of faculty members, its focus has changed from the teaching of mechanical rules, or the "plumbing" of a given civil-justice system, to a pedagogy that centers on a more theoretical, academic, and policy-oriented intellectual study.²⁷

A second change, one that is a somewhat natural consequence of academics joining the ranks of those teaching procedure, has been an increase in the number of academics with a research interest in procedure and a corresponding increase in scholarship being published by professors on procedural law. As Erik Knutsen, a civil-procedure scholar at Queen's University states, "In Canada, there are only a small number of full-time academics who identify themselves as having a special research interest in civil procedure."²⁸ While they may still be small in number, there are several examples of eminent scholars who have focused their research on adjectival law. Adrian Zuckerman of

25. See David Bamford et al., *Learning the 'How' of the Law: Teaching Procedure and Legal Education*, 51 OSGOODE HALL L.J. 45, 67–68 (2013) (citations omitted) ("In this issue's first article, Knutsen et al describe Civil Procedure in US law schools as primarily a first-year required course, taught by full-time academics. It is principally taught using a combination of the Socratic method, simulated procedural tasks, and readings from real lawsuits, and it includes doctrinal and theoretical consideration of questions of procedure and jurisdiction. The discussion on Canada in this article has articulated the advantages of an academic—as opposed to a purely 'nuts-and-bolts' practice approach—to teaching and learning civil procedure. These hold true in the United States as well.").

26. *Id.* at 67.

27. *Id.* at 67–68. While this has been the trend in North America and Australia, it has not been the case in England, where procedure is still seen generally as part of the vocational stage of legal training. *Id.* at 76–79; see Erick S. Knutsen et al., *The Teaching of Procedure Across Common Law Systems*, 51 OSGOODE HALL L.J. 1, 26–43 (2013) ("It is clear that the relevant professional bodies require that civil procedure be taught at the vocational stage of training and that the emphasis at that stage be to ensure that the student is prepared for practice. Furthermore, there is no requirement that civil procedure be taught at the academic stage. However, it does not necessarily follow that civil procedure is never taught at the academic stage or that it is never taught as an academic subject at the vocational stage.").

28. See Knutsen et al., *supra* note 27, at 15 ("Even fewer identify themselves as proceduralists. In fact, of those full-time, tenure-track academics teaching civil procedure at Canadian law schools as part of their regular teaching, it appears that only half a dozen or so would likely be identified by their colleagues as civil procedure academics.").

Oxford University is one such example and his biography reads: “Zuckerman’s principal interest is civil procedure. One of his principal contributions has been to rescue this important subject from the academic neglect it has suffered in English Universities.”²⁹ The many in-depth and policy-oriented reports on procedural reform published in recent years, beginning with the seminal report by Lord Woolf in 1996,³⁰ have also contributed to the academization of procedure as these reports highlighted the profound influence procedural rules have on procedural policy and philosophy. Lord Woolf advocated “a change of culture throughout the system”³¹ in order to deal with the high costs, long delays, and undue complexity of the current civil justice system, and did so by suggesting changes to the procedural rules then in force.

A third change concerns the type of scholarship we are witnessing in the field of civil procedure. Not only is there more scholarship being written on various aspects of procedural law and policy, but we are also starting to see published research dealing with the pedagogical dimensions of procedure focusing on what, when, how, and by whom civil procedure should be taught and, most importantly, what law students can learn about law and the legal process more broadly from a course on procedure.³²

This new dynamism in the world of procedure, brought about

29. *Biography*, ADRIAN ZUCKERMAN, <http://adrianzuckerman.co.uk/biography.php> (last visited Jan. 4, 2017).

30. WOOLF, FINAL REPORT, *supra* note 22.

31. *Id.* at ch. 2, para. 38.

32. See Bamford et al., *supra* note 25, at 67–72 (“A group of US non-proceduralist teachers of procedural law courses was asked whether knowing that their students had previously studied procedure affected their other courses. Their responses illustrate a number of ways in which an understanding of the procedural context enhances an understanding of the law itself.”); see also Kevin M. Clermont, *Integrating Transnational Perspectives into Civil Procedure: What Not to Teach*, 56 J. LEGAL EDUC. 524 (2006) (discussing how to effectively teach a broader view of civil procedure); Beth Thornburg et al., *A Community of Procedure Scholars: Teaching Procedure and the Legal Academy*, 51 OSGOODE HALL L.J. 93 (2013) (exploring “the link between teaching procedure and scholarship in the field”); Janet Walker, *Introduction: The Impact of Teaching Procedure*, 51 OSGOODE HALL L.J., at i–iii (2013) (“In the United States, where each of more than two hundred law schools is required to teach a compulsory civil procedure course to every law student, there exists a dynamic community of proceduralists with an impressively broad and diverse academic interest in the subject. By contrast, in Canada, despite a long history of treating procedure as a required subject, the Federation of Law Societies’ newly established standards for the common law degree have raised questions about the place of procedure in the prescribed curriculum.”).

by these interrelated changes, is an exciting phenomenon that enables future jurists to appreciate the profound impact of procedure on the broader dispute resolution system. As Stephen Goldstein has asserted, “[S]ocieties may see their basic values reflected more in their procedural systems than in their substantive law.”³³ Kevin Clermont maintains, “[N]o one can begin to understand any legal system without a careful dissection of its procedural component.”³⁴ Others have emphasized the importance of understanding the strategic and ethical considerations inherent to procedure, the broader purposes it serves, and its impact on judicial philosophy.³⁵ It is increasingly being seen not merely as a subject of adjectival law, whose sole purpose is to serve and enable substantive law, but rather as a substantive area of law unto itself with its own questions of legal theory and policy concerns.³⁶ Civil procedure has been eloquently described as “a mirror held up against the legal system itself.”³⁷

These exciting changes in procedural pedagogy have been adopted at McGill University’s Faculty of Law in Montreal, Quebec. I began teaching the course of *Judicial Institutions and Civil Procedure* at McGill in 2007, and I now form part of a group of committed professorial colleagues who teach procedure in accordance with this academic model and who publish research in this field.³⁸ The course taught at McGill begins with an

33. Goldstein, *supra* note 14, at 293.

34. Clermont, *supra* note 32, at 528.

35. Bamford et al., *supra* note 25, at 53, 75 (discussing the “strategic and ethical considerations” and the “theoretical and doctrinal complexity” of procedural law in the context of North America and Israel).

36. *See id.* at 73–75 (“It is accepted today that procedure has its own values that are independent of substantive law.”).

37. *Id.* at 75 (2013).

38. For a small segment of the work of my procedural colleagues, see, e.g., Daniel Jutras, *Culture et Droit Processuel: Le Cas du Québec*, 52 MCGILL L.J. 273 (2009); Frédéric Bachand, *Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism*, 2012 J. DISP. RESOL. 83 (2012); H. Patrick Glenn, *Le Recours Collectif, le Droit Civil et la Justice Sociale*, 29 REVUE DROIT UNIVERSITÉ SHERBROOKE [R.D.U.S.] 39 (1999); H. Patrick Glenn, *The ALI/UNIDROIT Principles of Transnational Civil Procedure as Global Standards of Adjudication?*, 9 UNIFORM L. REV. 829 (2004) [hereinafter Glenn, *ALI/UNIDROIT*]; Geneviève Saumier, *Competing Class Actions Across Canada: Still at the Starting Gate After Canada Post v. Lepine*, 48 CAN. BUS. L.J. 462 (2009). For a small segment of my procedural work, see Rosalie Jukier, *The Impact of Legal Traditions on Quebec Procedural Law: Lessons from Quebec’s New Code of Civil Procedure*, 93 CAN. BAR. REV. 1 (2015); Rosalie Jukier, *Inside the Judicial Mind: Exploring Judicial Methodology in the Mixed Legal System of Quebec*, 6 J. COMP. L. 54 (2011); Rosalie Jukier, *The Legacy of Justice Louis LeBel: The Civilian Tradition and Procedural*

examination of judicial institutions and the broad principles that define them, such as independence, impartiality, accountability, and publicity. These principles are taught in order to situate students in the institutional context in which the procedural rules are applied. Moreover, they are taught in such a way as to encourage students to take a critical look at the role of state institutions of civil justice. The course then moves to the teaching of procedural rules—but even in this part of the course, the rules are taught as illustrations of broader principles of policy and macro themes such as access to justice, judicial efficiency, and procedural fairness.

The rules governing costs awards, particularly advance or interim costs awards,³⁹ as well as the study of class actions⁴⁰ and summary judgments, are taught through the lens of access to justice.⁴¹ Newly prescribed limits on the time that may be spent on discovery,⁴² special procedures known as “simplified

Law, 70 SUP. CT. L. REV. [S.C.L.R.] 2d 27 (2015), reprinted in *THE DIGNITY OF LAW: THE LEGACY OF LOUIS LABEL* (Dwight Newman & Malcolm Thorburn, eds., 2015) [hereinafter Jukier, *LeBel*].

39. See *R. v. Caron*, [2011] 1 S.C.R. 78, paras. 41, 47 (Can.); *Little Sisters Book and Art Emporium v. Canada*, [2007] 1 S.C.R. 38, paras. 35–39, 67 (Can.) (“It is only a ‘rare and exceptional’ case that is special enough to warrant an advance costs award This means that a litigant whose case, however compelling it may be, is of interest only to the litigant will be denied an advance costs award. It does not mean, however, that every case of interest to the public will satisfy the test As compelling as access to justice concerns may be, they cannot justify this Court unilaterally authorizing a revolution in how litigation is conceived and conducted.”); *British Columbia v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, paras. 27–31, 38 (Can.) (“Another consideration relevant to the application of costs rules is access to justice Concerns about access to justice and the desirability of mitigating severe inequality between litigants also feature prominently in the rare cases where interim costs are awarded.”).

40. See *Hollick v. Metro. Toronto*, [2001] 3 S.C.R. 158, paras. 15, 27, 33 (Can.) (“[B]y distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own.”).

41. See *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, paras. 1–5, 24, 34 (Can.) (“Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just. Summary judgment motions provide one such opportunity.”).

42. See, e.g., Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194 s. 31.05.1 (Can.) (“Unless the court orders or the parties agree otherwise, where more than one party is entitled to examine a party or other person for discovery without leave, there shall be only one oral examination”); Code of Civil Procedure of Quebec, S.Q. 2016, c C-25.01, art 229, <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-25.01> (“No

procedure” for cases involving smaller monetary amounts,⁴³ mandatory maximum time rules for pre-trial periods,⁴⁴ as well as principles relating to standing and joinder⁴⁵ are taught within the meta-theme of judicial efficiency, and as examples of constraints imposed on party autonomy in order to lower the costs of civil justice. Topics such as fact versus notice pleading,⁴⁶ abuse of process (including SLAPPs—strategic lawsuits against public participation),⁴⁷ and enforcement of foreign judgments⁴⁸ are taught from the perspective of procedural fairness.

While all this development in legal pedagogy is interesting and innovative, thus far it is removed from the concept of mixity. The movement described above has been propelled by academics teaching civil procedure in law faculties situated in mono-systemic, or non-mixed, jurisdictions. The question, therefore, is what additional impact does a jurisdiction’s mixity have on the pedagogy of procedure?

pre-trial examination is permitted where the amount claimed or the value of the property claimed in the judicial demand is less than \$30,000.”).

43. See Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194 s. 76.02 (Can.) (providing for availability of simplified procedure).

44. See, e.g., Code of Civil Procedure of Quebec, S.Q. 1965, c C-25, art 110.1 (Can.) (setting out the mandatory limit of 180 days for the entire pre-trial period in Quebec). This time-limit was brought in through the 2002 amendments to the 1965 Code. See An Act to reform the Code of Civil Procedure, S.Q. 2002, c. 7, s. 14; see also Code of Civil Procedure of Quebec, S.Q. 2016, c C-25.01, art 173, <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-25.01> (“The plaintiff is required to ready the case for trial within six months after the case protocol is filed or the subsequent case management conference is held . . .”).

45. See *Canada v. Downtown Eastside Sex Workers United Against Violence Soc’y*, [2012] 2 S.C.R. 524, para. 26 (Can.) (“The concern about the need to carefully allocate scarce judicial resources is in part based on the well-known ‘floodgates’ argument. Relaxing standing rules may result in many persons having the right to bring similar claims and ‘grave inconvenience’ could be the result This factor is not concerned with the convenience or workload of judges, but with the effective operation of the court system as a whole.”); *Kingsway Gen. Ins. Co. v. Duvernay Plomberie et Chauffage Inc.*, 2009 QCCA 926, para. 70, [2009] J.Q. no. 4564 (Can.) (explaining that joinder and forced intervention of third parties is also assessed with judicial efficiency in mind).

46. Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 443, 452 (2010) (comparing the American pleading standard to foreign approaches, and concluding that the “American pleading standard is quite exceptionalist”).

47. See An Act to Amend the Code of Civil Procedure to Prevent Improper Use of the Courts and Promote Freedom of Expression and Citizen Participation in Public Debate, S.Q. 2009, c. 12 (Can.); see also Code of Civil Procedure of Quebec, S.Q. 1965, c C-25, arts 54.1–54.6 (Can.) (addressing the serious consequences of procedural abuse, including SLAPPs).

48. See generally *Beals v. Saldanha*, [2003] 3 S.C.R. 416 (Can.).

What mixity can teach us about the pedagogy of procedure lies in the comparative or transsystemic character of the perspectives examined. At McGill, in addition to canvassing meta-principles of judicial institutions, important policy considerations underlying procedural rules, as well as theoretical and ethical dimensions of procedure, the *Judicial Institutions and Civil Procedure* course covers its various topics from the vantage points of the civil and common law legal traditions (i.e., the common law adversarial system and continental civilian investigative one) as well as from the perspectives of a multiplicity of legal systems. The course is centered on a detailed examination of two Canadian jurisdictions' procedural rules, namely Quebec's and Ontario's, but reference is regularly made to other Canadian jurisdictions, and other countries such as England and the United States. For example, British Columbia is studied for its unique rules that institute a double-costs penalty for refusing a settlement offer⁴⁹ and for its provisions regarding the summary trial (as opposed to the summary judgment).⁵⁰ In addition, England is referenced for its role in initiating global civil-justice reform as well as for specific instances of reform, such as its joint-expert rule.⁵¹ The United States is studied in order to highlight differences in pleading standards (notice versus fact pleading),⁵² different presumptions in costs rules (the U.S. favoring a presumption that each party bears their own costs as opposed to the Canadian presumption that the losing party pays at least some of the winning party's

49. R.S.B.C. 168/2009, § 9-1(5)(b) (Can.).

50. R.S.B.C. Reg. 168/2009, § 9-7 (Can.).

51. See Civil Procedure Rules 1998, SI 1998/3132, r. 35.2(2), 35.7, 35.8 (Eng.).

52. See FED. R. CIV. P. 8, 10; Dodson, *supra* note 46, at 443 (citations omitted) (“Pleading . . . is a prominent feature of American civil procedure that has long been exceptional. Unlike civil law countries, which require detailed fact pleading and often evidentiary support at the outset, and unlike even most common law traditions that also require some fact pleading, Rule 8 only requires a short and plain statement of the claim showing that the pleader is entitled to relief, a formula that has traditionally focused on notice rather than facts.”) (internal quotations omitted); see also Edward D. Cavanagh, *Federal Civil Litigation at the Crossroads: Reshaping the Role of the Federal Courts in Twenty-First Century Dispute Resolution*, 93 OR. L. REV. 631, 633, 635 (2015) (citations omitted) (“The Federal Rules also introduced a simplified pleading system, commonly denominated as ‘notice pleading,’ thereby easing the heavy burden imposed on the parties. The factual details could then be developed through pretrial discovery. The aim was to facilitate, not to discourage, trial on the merits In addition, the Federal Rules introduced a simplified pleading system. A pleading no longer would have to fit within the confines of a cause of action cognizable at common law. Nor would the complaint have to contain a detailed factual recitation of all the elements necessary to make out a cause of action.”).

costs),⁵³ as well as a different conception of impartiality related to the fact that, in the U.S., some judges are elected—a concept foreign to Canada where all judges are appointed.⁵⁴

This approach to teaching procedure is seemingly quite different from the pedagogical practice prevalent in the United States. Although the American method is very academic and theoretical, the comparative approach is, according to the literature, either absent or rare.⁵⁵ As a result, several authors have characterized the pedagogical style of American procedure courses as “parochial”⁵⁶ or “provincial.”⁵⁷ According to Scott Dodson, “Many students in U.S. law schools will never learn a thing about the civil procedure rules or systems of other countries.”⁵⁸ There are, of course, some American scholars who tout the benefits of studying procedure comparatively, such as Kevin Clermont who asserts that “[c]omparative study helps overcome the common misconception that the particular procedural rules of one’s home jurisdiction are the only rules that

53. See Erik S. Knutsen, *Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada*, 36 QUEEN’S L.J. 113, 114, 140 (2010) (comparing the Canadian fee-shifting regime to the American costs-award regime).

54. See Roy A. Schotland, *New Challenges to the States’ Judicial Selection*, 95 GEO. L.J. 1077, 1077, 1094 (2007) (discussing the election of judges in thirty-nine U.S. states); see also Constitution Act 1867, 30 & 31 Vict. c. 3 § 96 (Eng.) reprinted in R.S.C. 1985, app. II, No. 5 (Can.) (“The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.”).

55. John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 545–47 (1995) (“Within the intellectual life of the American legal academy, comparative law is a peripheral field. Questions of comparative and foreign law seldom figure in the conversation about law and law-related subjects that comprises the common intellectual life of an American law faculty.”).

56. Antonio Gidi, *Teaching Comparative Civil Procedure*, 56 J. LEGAL EDUC. 502, 502 (2006) (“Notwithstanding recent developments, American proceduralists are among the most parochial in the world.”); Richard L. Marcus, *Putting American Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709, 709–10 (2005) (“Altogether, these distinctions—and the nasty aroma American litigation seems to elicit in much of the rest of the world—tend to confirm the American proceduralist’s view that it is best and sufficient to attend only to American topics. This exceptionalism also reinforces the tendency to view such navel-gazing as appropriate because procedure is peculiarly parochial.”); Clermont, *supra* note 32, at 530 (“Yet, even this limited exposure manages to deliver some of the side benefits of studying transnational litigation, such as widening the students’ and professor’s horizons and creating interest in further study, while overcoming the parochialism that so affect U.S. procedure.”).

57. Dodson, *supra* note 46, at 446 (“American proceduralists are infamously provincial.”).

58. *Id.*

would really work,” and that “the greatest benefit of studying other procedural systems . . . [is] the attainment of a deeper understanding of one’s own system.”⁵⁹ This aspiration, however, does not appear to have attracted mainstream support.

The comparative approach to studying procedure at McGill fits within its general philosophy of legal pedagogy, namely its hallmark transsystemic approach to legal education. The goal of transsystemic pedagogy is to free the study of law from jurisdictional, temporal, and systemic boundaries and thereby, to multiply the perspectives on legal study. Transsystemic legal education focuses on the fundamental structures, ideas, values, techniques, and processes of law, rather than the laws or legal rules of a single jurisdiction, and it is therefore natural for McGill professors to draw materials from a multiplicity of perspectives, traditions, and lenses. Students graduate with both civil and common law degrees and leave the faculty as cosmopolitan jurists, at ease in both civil and common law legal traditions, and with an understanding of law in its many forms, cultures, languages, and sites.⁶⁰

59. Clermont, *supra* note 32, at 530; see Luc-Marie Augagneur, *De la Preuve et des Systèmes Judiciaires en France et au Québec*, 63 REV. DU B. 401, 414 (2003) (“L’apprentissage d’un autre régime est autant une découverte de l’autre qu’une redécouverte de soi.”).

60. See generally David Howes, *Maladroit or Not? Learning to Be of Two Minds in the New Bijural Law Curricula*, 52 J. LEGAL EDUC. 55 (2002) (“The province of Quebec and the state of Louisiana are jurisdictions with a great deal to teach each other, but not as regards what it means to be a ‘civilian jurisdiction.’ While these two jurisdictions may ordinarily be classified as belonging to the civil law tradition, what they have to teach each other about is their respective *mixity*.”) (emphasis in original); Helge Dedek & Armand de Mestral, *Born to Be Wild: The “Trans-systemic” Programme at McGill and the De-Nationalization of Legal Education*, 10 GERMAN L.J. 889 (2009) (“Legal education is changing. What is changing is our understanding of ‘education,’ of how we learn and how we should teach. Also changing is our understanding of how to define what is ‘legal’ about ‘legal education.’ Most will nowadays agree that legal education should be more than a vocational training for the practice of the profession in a particular jurisdiction. In analyzing the development of legal education in recent years, we can distinguish two trajectories. Firstly, there is the ongoing attempt of specifically the North American legal academy to make legal studies a transdisciplinary endeavor. . . . Secondly, it seems that jurisdictional boundaries have lost significance in an internationalized, globalized and post-regulatory environment.”); Peter L. Strauss, *Transsystemia—Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?*, 56 J. LEGAL EDUC. 161 (2006) (“To start, I’d like you to imagine an agglomeration of twenty to thirty jurisdictions experiencing a profound change in the nature of their economic realities. Their economies, and thus the transactions within them and the businesses that conduct them, have been predominantly local in character. Now, political and economic developments are producing businesses and transactions increasingly trans-jurisdictional in character. Increasingly the counseling, drafting,

But this again calls into question the link between the mixity of Quebec procedure and legal pedagogy. Is procedure taught in this comparative way at McGill because of the faculty's general transsystemic focus, or because of some specific reasons linked to mixity? I would submit that, while the general transsystemic focus of McGill's law program reinforces this method of teaching procedure, there are two differences that separate the discipline of civil procedure from other private-law courses.

The first difference reflects that, while other private-law subjects at McGill, such as contractual obligations and extra-contractual obligations (Torts), are taught from a uniquely comparative perspective, those subjects differ from civil procedure in that they receive fairly distinct and disparate treatment in the civil and common law legal traditions. Using contract law as an example, while there are similarities in some areas, such as the interpretation of contracts, there are many differences including the absence of the concept of consideration in the civilian tradition, a different emphasis on various remedies (especially the remedy of specific performance for contract breach), and a distinctive approach to the doctrine of good faith.⁶¹ As such,

and litigating that goes on in lawyers' offices involves not one jurisdiction but two or three."); Yves-Marie Morissette, *McGill's Integrated Civil and Common Law Program*, 52 J. LEGAL EDUC. 12 (2002) ("Simply put, the [McGill] program is an attempt to integrate as fully as possible, in a three-year curriculum of 105 teaching credits, a bijuridical or bijural training in civil law and common law.").

61. While the civil law requires "cause" as an essential element of contract formation, it is a very different concept from consideration in the common law, which requires an onerous element to contracts. *See, e.g.*, Civil Code of Quebec, S.Q. 1991, c 64, art 1385 (Can.) ("It is also the essence of a contract that it have a cause and an object."). Additionally, the civil law recognizes the gratuitous contract. *See, e.g.*, Civil Code of Quebec, S.Q. 1991, c 64, art 1381 (Can.) ("When one party obligates himself to the other for the benefit of the latter without obtaining any advantage in return, the contract is gratuitous."). Furthermore, specific performance receives a much more generous interpretation in the civil law than the common law. For a comparative examination of specific performance, see Rosalie Jukier, *Taking Specific Performance Seriously: Trumping Damages as the Presumptive Remedy for Breach of Contract*, in *TAKING REMEDIES SERIOUSLY/LES RECOURS ET LES MESURES DE REDRESSEMENT: UNE AFFAIRE SÈRIEUSE* 87 (Robert J. Sharpe & Kent Roach eds., 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2006577. Finally, until recently, good faith, which must exist at the time of formation and performance of a contract in the civilian jurisdiction of Quebec, has been looked upon unfavorably by the common law. Civil Code of Quebec, S.Q. 1991, c 64, art 1375 (Can.) ("The parties shall conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished."); *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494, paras. 32 *et seq.* (Can.) ("In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general

while not done at McGill, it is possible to teach Quebec contract law in a less comparative way.

By contrast, Quebec procedural law, as previously demonstrated, is itself mixed and therefore it is *necessary*, not just pedagogically interesting, to teach it comparatively.⁶² For students to truly understand Quebec procedure, they must understand its mixed origins and the differences between the common law adversarial conception of civil justice as compared to the investigative or judge-centered systems of continental civilian regimes. This is especially true given the Preliminary Provision of Quebec's new Code of Civil Procedure. Paragraph three of that preliminary provision reads, "This Code must be interpreted and applied as a whole, in the civil law tradition."⁶³ Because this provision only recently came into force on January 1, 2016, there is not yet any judicial authority on the interpretation and meaning of this provision. At the very least, however, it suggests that students must understand the principles of codal interpretation and civilian methodology because, as some key decisions of the Canadian Supreme Court imply, no matter how borrowed it may be from the common law, Quebec procedure must adhere to civilian principles of interpretation and methodology.⁶⁴

organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations."); see Michael G. Bridge, *Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?*, 9 CAN. BUS. L.J. 385 (1984) ("The purpose of this paper is to respond to the argument that Anglo-Canadian contract law needs, or can usefully incorporate, a doctrine of good faith. Apart from the rule of *nemo dat quod non habet* and the doctrine of good faith purchase in matters of title transfer, it is probably accurate to say that our contract law contains little more than intermittent, discrete and superficial references to a good faith standard of behavior.").

62. See discussion *supra* Section II, which describes the mixed jurisdiction of Quebec's procedural law.

63. See Code of Civil Procedure of Quebec, S.Q. 2016, c C-25.01, preliminary provision (Can.), <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-25.01>.

64. See, e.g., *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743, paras. 35, 37, 39, 41 (Can.) ("The rules of Quebec civil procedure, which originate from widely differing sources, make up a Code of Civil Procedure. As such, they are part of a legal tradition that is different from the common law The codified law is paramount. The courts must base their decisions on it. Without denying the importance of the case law, this system does not give it the status of a formal source of the law, legitimate as a creative interpretation in determining the intention of the legislature, as expressed or implied in the statutes, may be A

Quebec's mixed procedural heritage demonstrates the specific relevance of teaching procedure from the perspective of both traditions. And McGill's Law Faculty has recognized that, due to its mixity, it is particularly important for students to understand both civil and common law structures and concepts. As a result, well before McGill moved to teaching law transsystemically in 1999, it started teaching procedure comparatively in 1986 with the adoption of a mandatory course called *National Civil Procedure*.⁶⁵ In many ways, civil procedure is the quintessential transsystemic course, a pioneer course that paved the way for larger-scale teaching on a transsystemic basis in the McGill program adopted well over a decade later.

There is, however, an additional reason for procedure to be taught comparatively: the increase in legal transplantation taking place in many jurisdictions. As law reformers look for ways to mitigate the problems of high cost, long delays, and undue complexity facing most western civil-justice systems, solutions attempted in other jurisdictions are often seen as viable possibilities for reform.⁶⁶ Accordingly, even non-mixed jurisdictions are looking to "the other" in an attempt to remedy a civil-justice system in crisis.⁶⁷ As a result of this cross-fertilization of ideas, academics in mono-systemic jurisdictions are increasingly recognizing the benefit of comparative teaching. As one multi-authored article on the pedagogy of procedure suggests, "The increasing transfer of procedural ideas between legal systems suggests that we should incorporate a component of comparative procedure. One option is to consider other civil litigation systems . . . which may provide a useful comparative analysis."⁶⁸

Due to this increase in the borrowing or transplantation of procedural ideas, it is hard, today, to speak of any pure procedural system. By way of example, it is fairly

Quebec court may not create a positive rule of civil procedure simply because it considers it appropriate to do so."); *see also* discussion, *infra* Section III(B).

65. McGill University, Faculty of Law Calendar 1986–87 (1986) at 22 (on file with author).

66. *See infra* note 113.

67. *See, e.g.*, Robert W. Emerson, *Judges as Guardian Angels: The German Practice of Hints and Feedback*, 48 VAND. J. TRANSNAT'L L. 707 (2015) (comparing the role of the American judiciary to that in the German inquisitorial system: "The German practice of Richterliche Hinweispflicht is a judicial duty to give hints and feedback . . . American Civil jurisprudence would benefit from this German Concept of the judiciary's role.").

68. Bamford et al., *supra* note 25, at 64.

uncontroversial to classify the Canadian province of Ontario as a mono-systemic common law jurisdiction. As such, it is a jurisdiction that has historically followed the common law adversarial system of procedure. However, in recent years, Ontario has moved its procedural rules in the direction of increased judicial oversight and constraints on party autonomy. This new path has been implemented through judicial case management and some particular procedural reforms such as a mandatory pre-trial conference, greater powers for judges in the area of summary judgments, and limitations on time spent on discovery.⁶⁹ Should Ontario's procedural system still be classified as a common law adversarial system? It is arguably now a mixed system, one whose foundation is based on the adversarial model but upon which additional characteristics, belonging more to the judge-centered systems of the continental civil law, are built. In fact, many argue that we are seeing a convergence or rapprochement within civil-justice systems, exemplified by the harmonization project developed by the American Law Institute (ALI) and Unidroit that resulted in the *ALI/Unidroit Principles on Transnational Civil Procedure*.⁷⁰ Whether or not we are truly achieving harmonization of procedural principles, the increasing transfer of procedural ideas amongst jurisdictions suggests the need to incorporate comparative perspectives into the teaching of procedural law.

The teaching of civil procedure must not only abandon the traditionally-narrow perspective as a conglomeration of mechanical rules, it must go further by shedding its jurisdictionally-restrictive character and cease to be tied exclusively to the rules of the local jurisdiction where the law faculty in question is located. This is important because the comparative perspective adds much to the academic inquiry that proceduralists are increasingly adopting in the classroom. Dodson, citing Julie Suk as authority, has asserted, “[F]oreign procedural regimes have much to tell us about the procedural, substantive, and structural consequences of different procedural

69. Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194 ss. 20, 29.1.03(2)–(3), 29.2, 55.01, 76.03, 76.04(2), and 77 (Can.) (addressing summary judgment, limits on discovery in ordinary proceedings, limits on discovery in simplified proceedings, pre-trial conference, and case management respectively); see *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, paras. 1–5, 24, 34 (Can.) (discussing summary judgment).

70. See CATHERINE PICHÈ, *DROIT JUDICIAIRE PRIVÉ* 496–500 (2d ed. 2014); *ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE* (adopted by The American Law Institute at Washington, D.C., May 2004 and by UNIDROIT at Rome, April 2004); Glenn, *ALI/UNIDROIT*, *supra* note 28, at 830–38.

choices.”⁷¹ It is also necessary because the comparative perspective is becoming more and more relevant as legislators in many jurisdictions are looking to “the other” for solutions to systemic procedural problems.

Civil procedure at McGill, with its academic and transsystemic focus, can be seen as leading the way. McGill’s pedagogy, largely spurred on by the historically-mixed character of procedural law in Quebec, is exemplified both by the decreased focus on procedure as a conglomeration of discrete rules and a growing realization that procedural systems are all becoming mixed because of the increasingly transplanted nature of the discipline. Viewed in this light, civil procedure is a law school subject that can be seen as a natural springboard for comparative study.

B. THE IMPACT ON THE JUDGE: JUDICIAL DECISION-MAKING IN A MIXED PROCEDURAL SYSTEM

Given its mixed nature, it is not surprising that many aspects of Quebec procedural law that come before the courts concern areas that have been borrowed from, or inspired by, the common law adversarial system. Discovery, privilege, and the class action are but three examples of common law inspired processes that occupy an important place in the Quebec procedural system and, as a result, issues concerning them often arise before the courts. As we move from the perspective of the teacher to that of the judge in the mixed jurisdiction of Quebec, the relevant question that judges face is how to interpret and apply Quebec law when the relevant provisions or issues originate in the common law, and what role common law sources should play in that interpretation.

Due to its extensively-transplanted nature, this question often arises in the area of procedure. It is, however, also one that is relevant to other domains of Quebec law transplanted from the common law. Two obvious examples are the remedy of specific performance for contract breach and rules of evidence. The law related to these areas of borrowed law may help inform the treatment of procedural law and vice versa.

Not surprisingly, there is no single answer to this perennial

71. See Dodson, *supra* note 46, at 468 (citing Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315 (2008)).

question but rather a spectrum of answers. As one may expect, among the vast volume of jurisprudence emanating from Quebec, it is fairly easy to find, at one end of the spectrum, judgments that apply common law precedents and principles without much hesitation. For instance, in an appellate decision on judicial recusal, the Quebec Court of Appeal freely applied the common law test of apprehension of bias, asserting, “Surely the distinctiveness of our society, and our civil law rather than common law system, do not require that we be deprived of a useful and logical remedy available elsewhere!”⁷² Furthermore, at that end of the spectrum, we find judgments that even suggest that it is incumbent for a Quebec court to resort to the common law where the issue originates in the common law and there is a lacuna in the civil law.⁷³

However, judgments at the other end of the spectrum, ones that warn against a knee-jerk reaction to applying the common law, are also fairly easy to locate. Decisions at this end of the spectrum emphasize the complete nature of the civil law system and warn against the application of foreign legal principles without first ensuring their compatibility with Quebec law.⁷⁴

While it is not easy to reconcile the diversity of judicial opinion on this subject, the appropriateness of the use of authority from another legal tradition will always be contextual and dependent on a variety of factors. Of course, if the subject matter of the issue before the court is a federal one that is regulated in a uniform manner across the country (e.g., bankruptcy), then decisions from other jurisdictions in Canada are directly applicable, regardless of the legal tradition to which those jurisdictions belong.

Within areas of Quebec private law that are regulated provincially, the availability, or lack thereof, of Quebec sources to

72. *S.(P.) v. C.(A.J.)*, [1993] R.J.Q. 625, para. 11 (Can.). In Canada, whether a decision-maker is impartial depends on whether the impugned conduct gives rise to a reasonable apprehension of bias. Actual bias need not be established. The test for apprehension of bias is: what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude? See *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, para. 31 (Can.) (citations omitted).

73. See *Wightman v. Widdrington*, 2007 QCCA 1687 at para. 58, [2008] R.J.Q. 59, para. 58 (Can.).

74. *Anglo Pacific Group PLC v. Ernst & Young, Inc.*, [2013] R.J.Q. 1264, para. 36 (Can.) (“Civil law is a complete system, and care must be taken not to adopt principles from foreign legal systems without questioning their compatibility with our law.”).

interpret the issue of law at hand is also a relevant consideration. For example, there are areas of transplanted law in Quebec that have been given explicit legislative treatment. Discovery, for example, has been codified in the Code of Civil Procedure and many of its nuances, such as what may be discovered and the timing of such discovery during the pre-trial process, are dealt with by Quebec provisions and corresponding jurisprudential interpretation.⁷⁵ As such, although discovery was inherited from the common law, it is only with respect to issues in discovery that have not been treated by Quebec law that give rise to the question of whether resort to the common law is appropriate.⁷⁶

Perhaps because of the pervasiveness of legal transplantation that has occurred in Quebec procedural law, the question of how judges should interpret and apply Quebec law where its origins derive from common law sources, and whether common law authorities are relevant, has arisen on numerous occasions at the Canadian Supreme Court level in the area of civil procedure.

In the leading case of *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc. (Lac d'Amiante)*,⁷⁷ the Supreme Court had to decide whether the information obtained during the process of discovery should remain confidential if the case never goes to trial. The Quebec Court of Appeal had held that it should remain confidential largely because this was the solution adopted by the common law from which Quebec had originally borrowed the concept.⁷⁸ The Supreme Court, in a judgment penned by Justice LeBel, maintained the holding of the Quebec Court of Appeal on the merits, but criticized the basis upon which the decision had been rendered, namely common law authority.

In his judgment, Justice LeBel applied what he later termed

75. See Code of Civil Procedure of Quebec, S.Q. 1965, c C-25, arts 396.1–398.2 (Can.); *R.J.R. MacDonald, Inc. v. Canada (Procureur général)* [1989] R.J.Q. 3348, para. 14 (discussing interpretation of when third parties may be examined on discovery with court permission pursuant to arts 397(4) and 398(3)). See also Code of Civil Procedure of Quebec, S.Q. 2016, c C-25.01, art 229 (Can.), <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-25.01> (introducing new time limitations for discovery).

76. See *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743, paras. 35, 37, 39, 41 (Can.) (discussing the appropriateness of resorting to the common law where issues of discovery had not been addressed by the Code of Civil Procedure).

77. See *Lac d'Amiante*, [2001] 2 S.C.R. at paras. 35, 37, 39, 41.

78. *Id.* at para. 47.

a “*grille d’analyse civiliste*.”⁷⁹ His civilian analysis was based on the premise that “although Quebec civil procedure is mixed, it is nonetheless codified, written law, governed by a tradition of civil law interpretation.”⁸⁰ According to Justice LeBel, “In the civil law tradition, the Quebec courts must find their latitude for interpreting and developing the law within the legal framework comprised by the Code and the general principles of procedure underlying it.”⁸¹ As a result, Justice LeBel based the confidentiality of discovery on principles found in the Code of Civil Procedure, the Civil Code of Quebec, and the Quebec Charter of Human Rights and Freedoms.⁸² His reasoning included reference to the fact that the Code of Civil Procedure did not consider discovery to be part of the sitting of the court, thereby exempting it from the open-court principle, as well as the protection of privacy interests afforded by the Civil Code of Quebec and the Quebec Charter.

While the *Lac d’Amiante* decision suggests a staunchly civilian approach to the interpretation of areas of the law that had been transplanted from the common law, in subsequent Supreme Court judgments, Justice LeBel adopts a more flexible position and admits that there is a residual, gap-filling role for the common law in appropriate cases. As such, in *Globe and Mail v. Canada*, a case dealing with the existence of a journalist-source privilege, the Supreme Court acknowledged that “[given] the mixed source of the Quebec law of procedure and evidence . . . it becomes difficult to accept the argument that there is no residual role for common law legal principles”⁸³ Ultimately, the Supreme Court admitted the existence of such privilege, even though it was nowhere to be found explicitly within Quebec law, stating, “If the ultimate source of a legal rule is the common law, then it would be only logical to resort to the common law, in the process of interpreting and articulating that same rule in the civil law.”⁸⁴

A similar approach was advocated by the Supreme Court in

79. Louis LeBel, *L’Influence de la Cour Suprême du Canada sur l’Application du Code Civil du Québec Depuis 1994*, 88 CAN. BAR. REV. 231, 241 (2010). A “*grille d’analyse civiliste*” may be translated as a “civilian analytical grid.”

80. *Lac d’Amiante*, [2001] 2 S.C.R. at para. 39.

81. *Id.*

82. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (Eng.).

83. [2010] 2 S.C.R. 592, para. 45 (Can.).

84. *Id.*

the more recent case from Quebec, *Union Carbide Canada Inc. v. Bombardier Inc.* The Court, in a decision written by Justice Wagner, accepted and applied the common law settlement privilege, which is an evidentiary rule that applies to protect information exchanged during settlement negotiations, as well as the common law exception to such privilege that applies where a party seeks to prove the existence or the scope of a settlement.⁸⁵

It is somewhat difficult to reconcile this latter approach with that of *Lac d'Amiante*. However, upon closer examination, there are important differences between the cases. Unlike *Globe and Mail* and *Union Carbide*, in *Lac d'Amiante* there were ample Quebec civilian authorities to support the confidentiality of discovery and it was, therefore, less necessary to resort to the common law for authoritative precedent. However, in privilege cases, there was little to rely on in Quebec law and the Court noted important policy reasons to support the existence of the privilege that applied equally in Quebec.⁸⁶ Moreover, in *Globe and Mail*, Justice LeBel imposed an important limitation to the applicability of the common law in Quebec cases. He clarified that resort to the common law “is, of course, premised on the fact that the interpretation and articulation of such a rule would not otherwise be contrary to the overarching principles set out in the C.C.Q. and the Quebec Charter.”⁸⁷

This latter limitation resonates with Quebec courts' interpretation and application of the remedy of specific performance for contract breach. The procedural implementation of this remedy, namely the injunction, was borrowed from the common law and transplanted into Quebec civil law. As a result, until the 1980s, the jurisprudence tended to give this remedy the same narrow and restrictive interpretation it received in the common law. According to Supreme Court Justice Pigeon in 1975, “[T]he principles established in common law jurisdictions [must apply in Quebec] since this is a remedy taken from them.”⁸⁸

85. *Union Carbide Can. Inc. v. Bombardier Inc.*, [2014] 1 S.C.R. 800, paras. 27–37.

86. *See, e.g.*, *Sable Offshore Energy Inc. v. Ameron Int'l Corp.*, [2013] 2 S.C.R. 623, para. 12 (Can.) (citations omitted) (“Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a *prima facie* presumption of inadmissibility, exceptions will be found when the justice of the case requires it.”) (internal quotations omitted).

87. *Globe and Mail*, [2010] 2 S.C.R. at para. 45.

88. *Trudel v. Clairol Inc. of Can.*, [1975] 2 S.C.R. 236, 246 (Can.).

Gradually this thinking evolved and the Quebec judiciary began to acknowledge that, despite its transplanted nature, the remedy of specific performance needed to be adapted in order to be compatible with overarching civilian legal principles.⁸⁹ The restrictive interpretation of the common law, due to the remedy's origins in equity, did not fit the civilian tradition that never distinguished between law and equity, as was the case in England. Furthermore, the entire remedial philosophy of the civil law differs from that of the common law. In the civil law tradition, there is more emphasis on keeping the contract between the parties alive and enforcing the *parole donnée* of the debtor. The civil law does not, in general, subscribe to the adage of Oliver Wendell Holmes that “[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and *nothing else*.”⁹⁰ On the contrary, in the civilian tradition, there is a presumptive duty to perform one's contractual promises.⁹¹

As a result, as Justices LeBel and Wagner asserted in a recent Supreme Court decision concerning class actions, another procedural remedy unknown to the civil law, “Caution must be exercised when applying the principles from [common law decisions] to the rules of Quebec civil procedure relating to class actions.”⁹² Admitting that common law sources can “provide a general framework,” the judges warned that, “tests established in a common law context cannot necessarily be imported without adaptation into Quebec civil procedure.”⁹³

The series of judicial interpretations of various elements of Quebec procedural law that have been transplanted from the common law has resulted in a contextual approach that yields a

89. *Varnet Software Corp. v. Varnet U.K. Ltd.*, [1994] R.J.Q. 2755, 2758 (Can.) (“At the outset, I must clearly state that I agree with the respondent’s contention that under the Civil Law of Quebec, specific performance of contracts is the general rule, unlike the Common Law approach which favours compensation for breach by damages awards. I also agree that specific performance cannot be granted in certain cases where the personal action of the debtor of the obligation is of the essence.”).

90. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (emphasis added).

91. *See* Jukier, *supra* note 61, at 88 (citations omitted) (“[B]eginning in the 1980s, a new trend began in Quebec when several judges bravely rejected the inappropriate allegiance to the narrow common law attitude and specific performance emerged as an important remedy in Quebec law, eventually taking its rightful place as the presumptive remedy.”).

92. *Vivendi Can. Inc. v Dell’Aniello*, [2014] 1 S.C.R. 3, para. 48 (Can.).

93. *Id.*

spectrum of solutions rather than a single answer. Undoubtedly, however, it is the mixity of Quebec procedural law that has produced this unique judicial methodology. It is an approach that allows judges to be open to common law sources for purposes of gap-filling, all the while mindful that the use of common law authorities must be tempered by caution and adherence to civilian methodology and codal interpretation. This approach must also be moderated by a desire not to offend overriding civilian rules or principles and by the rejection of wholesale application of the common law in favor of contextual adaptation.⁹⁴

Just as mixity can teach us a great deal about legal pedagogy, it can also inform judicial methodology. And if judges themselves are looking to common law, but are also careful to remain loyal to civilian principles and methods, this is all the more reason to prepare our law students properly by teaching them civil procedure from a comparative perspective.

C. THE IMPACT ON THE LEGISLATOR: LAW REFORM AND THE MIXED PROCEDURAL SYSTEM

In recent decades, many jurisdictions have undergone substantial legislative reform of their procedural rules. This has been a direct result of the state of crisis perceived within most western civil justice systems. The 1996 *Lord Woolf Report* in England spawned similar critical reflections in Canada.⁹⁵ In 2001 in Quebec, Professor Denis Ferland chaired a civil procedure reform committee that produced a report entitled *Une Nouvelle Culture Judiciaire*, the very title of which stressed the need to change the culture within the civil-justice system.⁹⁶ In Canada, most recently, Justice Cromwell of the Supreme Court chaired the committee that produced the 2013 *Report on Access to Civil and Family Justice*.⁹⁷

All of these reports identified the same major problems of

94. See Jukier, *LeBel*, *supra* note 38, at 40–43.

95. WOOLF, FINAL REPORT, *supra* note 22; *see, e.g.*, Supplemental and Final Report, *Ontario Civil Justice Review*, ONT. MINISTRY ATT'Y GEN., (November 1996) at n.5, <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/suppreport/index.php> (last updated Nov. 16, 2015) (“In this respect, we note particularly the highly regarded recommendations of The Woolf Inquiry in the United Kingdom.”).

96. DENIS FERLAND ET AL., *UNE NOUVELLE CULTURE JUDICIAIRE: RAPPORT COMITÉ DE RÉVISION DE LA PROCÉDURE CIVILE* (2001).

97. ACTION COMM. ON ACCESS TO JUSTICE IN CIVIL AND FAMILY MATTERS, *ACCESS TO CIVIL AND FAMILY JUSTICE: A ROADMAP FOR CHANGE* (2013), http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf.

high cost, long delay, and undue complexity in the civil-justice system and proposed changes to procedural rules that would lead to a significant shift in the mentality surrounding litigation and the use of courts to resolve disputes. While the specific reforms to procedural rules that have been introduced are particular to each jurisdiction, there are three major policy changes that cut through all of these initiatives, namely, the need for increased case management by judges, the injection of the requirement of proportionality in the use of procedures, and the desire to create mechanisms that would encourage out-of-court settlement.

In Quebec, the reform of its procedural rules that would bring into effect the aforementioned changes began with amendments to the past Code of Civil Procedure in 2002 and 2009 and continued with the enactment of an entirely new Code that came into force on January 1, 2016.⁹⁸ As the second paragraph of the Preliminary Provision explains, the reformed Code was designed to ensure the accessibility of justice, the promptness of justice, the proportionate and economical application of procedural rules, and the inculcation of a spirit of cooperation in the exercise of parties' rights.⁹⁹

As a result, the macro changes in this latest codal reform include: (1) a much stronger encouragement of, and obligation to consider, various forms of alternative dispute resolution (ADR) before a dispute may be referred to the courts;¹⁰⁰ (2) a reinforced principle of proportionality that applies to parties' actions, pleadings and means of proof;¹⁰¹ (3) a more robust system of judicial case management and oversight;¹⁰² (4) limitations on the

98. Code of Civil Procedure of Quebec, S.Q. 2016, c C-25.01, arts 148(4), 158(2), 234 (Can.), <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-25.01>.

99. See Code of Civil Procedure of Quebec, S.Q. 1965, c C-25, preliminary provision (Can.).

100. Code of Civil Procedure of Quebec, S.Q. 2016, c C-25.01, arts 1–7 (Can.), <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-25.01> (“[P]arties must consider private prevention and resolution processes before referring their case to the courts.”).

101. Code of Civil Procedure of Quebec, S.Q. 2016, c C-25.01, art 18 (Can.), <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-25.01> (“The parties to a proceeding must observe the principle of proportionality and ensure that their actions, their pleadings, including their choice of an oral or a written defence, and the means of proof they use are proportionate, in terms of the cost and time involved, to the nature and complexity of the matter and the purpose of the demand or the application.”).

102. Code of Civil Procedure of Quebec, S.Q. 2016, c C-25.01, arts 9, 19, 148, 158 (Can.), <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-25.01> (“Subject to the duty of the courts to ensure proper case management and the orderly progress of proceedings, the parties control the course of their case insofar as they comply with the principles, objectives and rules of procedure and the prescribed time limits.”).

availability of discovery,¹⁰³ and (5) a reconceptualization of the role of expert evidence where joint expertise is introduced as the default position.¹⁰⁴ Previous amendments, such as the setting of strict time delays for the parties' pre-trial period that had been introduced in 2002,¹⁰⁵ and sanctions for abusing procedures and court processes that were introduced in 2009,¹⁰⁶ have been continued in the new Code.¹⁰⁷

What is interesting about these changes to the procedural rules is that they have the effect of moving Quebec's civil-justice system closer to the civilian conception of procedure and away from the classical common law adversarial system. Most importantly, the role of the judge has changed dramatically. Rather than being a silent umpire,¹⁰⁸ the judge is mandated to

103. Code of Civil Procedure of Quebec, S.Q. 2016, c C-25.01, art 229 (Can.), <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-25.01>.

104. Code of Civil Procedure of Quebec, S.Q. 2016, c C-25.01, arts 148(4), 158(2), 234 (Can.), <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-25.01> ("At any stage of a proceeding, if it considers that expert evidence is necessary in order to decide the dispute, the court, even on its own initiative, may appoint one or more qualified experts to provide such evidence.").

105. Code of Civil Procedure of Quebec, S.Q. 1965, c C-25, art 110.1 (Can.) ("Actions and applications that are to be contested orally must be heard or scheduled for proof and hearing . . . within a peremptory time limit of 180 days after service of the motion.").

106. Code of Civil Procedure of Quebec, S.Q. 1965, c C-25, arts 54.1–54.6 (Can.) ("A court may, at any time, on request or even on its own initiative after having heard the parties on the point, declare an action or other pleading improper and impose a sanction on the party concerned. The procedural impropriety may consist in a claim or pleading that is clearly unfounded, frivolous or dilatory or in conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, or in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate.").

107. See Code of Civil Procedure of Quebec, S.Q. 2016, c C-25.01, arts 51–56, 173 (Can.), <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-25.01> (addressing abuse of process and time limits respectively).

108. Geoffrey C. Hazard Jr. & Angelo Dondi, *Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits*, 39 CORNELL INT'L L.J. 59, 61 (2006) (citations omitted) ("[I]n civil law systems, civil cases are actually directed by the judge, with subordinate participation by the parties' advocates In a metaphorical comparison, the judge is conceived as the priest, while the advocates act as the acolytes—deferential assistants in a ceremony controlled thoroughly by the judge A similar and grossly simplistic conception of the common law judge is that of a passive moderator between presentations organized and directed by rival advocates Accordingly, advocates in common law litigation are referred to as 'combatants,' such as those participating in a tennis or wrestling match, while the judge acts as an umpire in the traditional metaphor."); see Kötz, *supra* note 14, at 40 ("[W]hen presentation of the case begins at the trial the common law judge knows nothing, or very little, about the case.

become more vocal, involved, and directive, reminiscent of the role occupied by the continental-civilian judge.¹⁰⁹ The parties' control of their case is now subject to the court's duty to ensure proper case management, and this case-management role gives judges extensive powers to take whatever measures are necessary to simplify, expedite, and shorten the trial, require joint expertise, determine terms for pre-trial examinations on discovery, and order an oral defense.¹¹⁰ Moreover, the parties' control of their case is now subject to strict time limitations, both with respect to the duration of the pre-trial period and with respect to the time that may be spent on discovery.¹¹¹

The changes being introduced in Quebec confirm the increase in legal transplantation taking place in adjectival law. Many of the ideas being enacted in Quebec, such as the new time limits imposed on discovery, suggest an explicit rejection of the party-centered adversarial system. Other reforms, such as judicial case management, are arguably influenced by the more judge-centered procedural systems of continental Europe. And Quebec is not alone in this regard. There is evidence that Lord Woolf, in common law England, looked to the neutral, court-appointed experts of continental jurisdictions to support his suggestions regarding new expert evidence rules in England.¹¹²

Having not been involved in its preparation for trial he is hardly in a position to 'run the show,' to handle the questioning of witnesses and to play a dominant role in the development of the case in the court-room. It is not a surprise, therefore, that the common law judge appears to the civil law observer as fairly passive, receptive, and detached.").

109. See Hazard & Dondi, *supra* note 108; Kötz, *supra* note 14, at 41; Sherman, *supra* note 14, at 511 (citing Wolfgang Zeidler, *Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure*, 55 *AUS. L.J.* 390 at 394 (1981)).

110. See Code of Civil Procedure of Quebec, S.Q. 2016, c C-25.01, arts 19, 158 (Can.), <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-25.01>.

111. Code of Civil Procedure of Quebec, S.Q. 2016, c C-25.01, arts 173, 229 (Can.), <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-25.01> (limiting the pre-trial period to 6 months, unless a judge grants an extension, only allowing discovery in cases in which the value in dispute exceeds \$30,000, and further limiting discovery to three hours for family cases and those involving less than \$100,000, and five hours for all other cases).

112. WOOLF, FINAL REPORT, *supra* note 22, at ch. 13, paras. 8–9 (“[T]he traditional English way of deciding contentious expert issues is for a judge to decide between two contrary views. This is not necessarily the best way of achieving a just result. . . . In continental jurisdictions where neutral, court-appointed experts are the norm, there is an underlying assumption that parties' experts will tell the court only what the parties want the court to know. For the judge in an inquisitorial system, the main problem is that it may be difficult for him to know whether or not to accept a single expert's view. There is no suggestion, however, that he is inevitably less

After all, learning about another system can be a source of innovation and creativity—an invitation to reconsider certain ideas that were previously thought set in stone.¹¹³ Reform around expert witnesses provides one such example. The introduction of judge-ordered joint expertise is among the most controversial of the Quebec reforms because it removes parties' rights to present their evidence as they see fit via the testimony of multiple expert witnesses.¹¹⁴ And yet, with trials often becoming a battle between experts, this reform may prove to be an important part of the solution to the ills of the current civil-justice system.

Law reform in the area of civil procedure, with its increased blurring of tradition-based lines, has the effect of creating more mixity within reformed civil-justice systems. Quebec's system is, of course, still quite removed from the continental civilian "dossier" system where the judge controls the evidence and directs the case. It remains adversarial in that the parties continue to control the examination and cross-examination of parties and witnesses and submit arguments in open court. However, as adversarial systems in many jurisdictions, including Quebec, become tempered with judge-centered case management and directive rules regarding time constraints on pre-trial activity, and limits on discovery and expert witnesses, they inevitably become more mixed. Quebec's procedural system is, unquestionably, more mixed than ever before. While its sources and historical development were always mixed, its characteristics today truly exemplify a hybrid system. And, as a result of this increased mixity in legislated procedural rules, it is more important than ever to understand procedure from a comparative standpoint.

likely to reach the right answer than his English counterpart.”).

113. See Augagneur, *supra* note 59 (characterizing learning about another system as “une invitation à remettre en cause certaines règles qu'on estime indéboullonnables . . . une source d'innovation et de créativité . . .”); see also Emerson, *supra* note 67, at 712 (“In general, the study of comparative procedure, by challenging and defending concepts and issues in America's procedural process, allows for a better understanding of U.S. procedures as well as those of other countries. Only after understanding the complexities, strengths, and weaknesses of each system may America use the knowledge to consider reforming its own system, adopting new models, or simply broadening perspectives.”).

114. See, e.g., BARREAU DU QUÉBEC, RAPPORT DUE SOUS-COMITÉ MAGISTRATURE-JUSTICE-BARREAU SUR LES EXPERTISES 64-65 (2010), <http://www.barreau.qc.ca/pdf/medias/positions/2007/200707-expertises.pdf>; COMITÉ SUR L'EXPERTISE FAMILIALE, RAPPORT DU COMITÉ SUR L'EXPERTISE EN MATIÈRE FAMILIALE (1999), <http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/rapp-cemf.pdf>.

CONCLUSION

Procedural law was once thought to be the mere plumbing of the civil justice infrastructure. Consequently, its importance was relegated to the detailed examination of the micro legal rules in force in the local jurisdiction. Its use, by parties and their attorneys, was largely instrumental in that the rules were seen primarily as the means to accomplish litigation strategy, whatever the costs, delays, or injustice such a strategy may have produced.

More recently, there has been a radical shift in the conception of civil procedure. It is now recognized that our procedural system is integral to our very conception of justice—a “mirror held up against the legal system itself.”¹¹⁵ As a result, this new conception has created great changes in legal pedagogy, transforming the focus in the law classroom to a theoretical, policy-oriented, and academic one. However, the mixity that has occurred in the legislative evolution of civil procedure invites us to go further and consider teaching and learning about the subject from a comparative perspective. This comparative focus is essential because the influence of legal traditions, and the role played by the mixity of such traditions, has had profound effects on judicial decision-making, and the methodology used by the judiciary, in this area.

Quebec is certainly not the only jurisdiction to have recently undergone significant reform to its procedural law, nor is it the only jurisdiction to evidence mixed undertones in its tradition-based procedural rules. However, because of its status as a mixed jurisdiction, combined with the unique historical development of its procedural law, it is a jurisdiction that provides a particularly interesting laboratory to study the impact of mixity on legal pedagogy, judicial methodology, and law reform.

115. See Bamford et al., *supra* note 25, at 75.